

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	

To: The Commission

PETITION FOR WAIVER OF SACRED WIND COMMUNICATIONS, INC.

Pursuant to Section 1.3 of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ Sacred Wind Communications, Inc. (“Sacred Wind”)² respectfully requests a limited waiver and extension of the July 17, 2019 election deadline for offers of Alternative Connect America Model (“A-CAM”) II support³ so that the Commission may direct the Wireline Competition Bureau (“Bureau”) to consider evidence of additional eligible locations and revise Sacred Wind’s A-CAM II offer accordingly.⁴ Upon close examination of the data for funded locations within the eligible census blocks of Sacred Wind’s A-CAM II offer, Sacred Wind discovered a significant shortfall of funded locations relative to actual locations within its eligible census blocks. As detailed herein and in the supporting data, such locations are largely

¹ 47 C.F.R. § 1.3.

² Sacred Wind, a regulated local exchange carrier, is a wholly owned affiliate of its holding company, Sacred Wind Enterprises, Inc., also a Class C corporation of New Mexico.

³ See *Wireline Competition Bureau Issues Corrected Alternative Connect America Model II Offer to 37 Companies, Extends the Election Deadline, and Seeks Comment of Location Adjustment Procedures*, WC Docket No. 10-90, Public Notice, DA 19-504 (rel. June 5, 2019).

⁴ Though Sacred Wind declines the Commission’s A-CAM II offer as-is, it requests this waiver and extension out of an abundance of caution to preserve its right to accept a revised A-CAM II offer in the future.

Navajo residential communities that are unserved or underserved. These locations also are not located within the study area of an unsubsidized competitor.

The funded location shortfall is substantial with over 4,700 locations excluded. But for the exclusion of these locations, Sacred Wind would have elected to receive A-CAM II support. Even with the A-CAM II Tribal Factor, Sacred Wind's need to continue infrastructure improvements on unserved Tribal lands results in higher opex and capex costs. More troubling, however, is that the exclusion of these locations from the A-CAM has rendered them invisible to the Commission for purposes of bridging the digital divide in rural and Tribal areas. Had Sacred Wind been able to accept its A-CAM II offer as-is, Sacred Wind feasibly could satisfy its voice and broadband performance obligations without ever deploying to a single one of these excluded locations.

I. BACKGROUND

A. Sacred Wind Overview.

Sacred Wind is a privately owned, New Mexico-based corporation formed in 2004 to introduce basic telephone and broadband services to thousands of unserved homes on Navajo Reservation and near-Reservation lands. Sacred Wind is the only non-Tribal incumbent local exchange carrier formed exclusively to serve Tribal customers. In 2006, the company acquired a portion of Qwest's service territory that comprised approximately 3,200 square miles in northwestern New Mexico on the Navajo Reservation and near-Reservation lands known as the "checkerboard." Sacred Wind also acquired limited Qwest "last mile" copper facilities in this territory. Over the first four years of its existence, Sacred Wind operated leased Qwest facilities fed from Qwest's nearby wire centers. At the same time, Sacred Wind constructed a new telecommunications infrastructure from which to operate – a hybrid fixed wireless and copper

last mile system built atop an all Internet Protocol (“IP”) platform, supported by fiber optic and microwave backhaul.

Sacred Wind serves a population of approximately 23,300 people, 98 percent of whom are Navajo citizens. The service territory’s average population density is approximately 7.3 people per square mile, one of the most sparsely populated areas in the country. Sacred Wind is a carrier of last resort for an estimated 12,200 households,⁵ meaning that it cannot terminate or withdraw from providing telephone service unless the New Mexico Public Regulation Commission (“NMPRC”) finds that another telecommunications company is able to provide service without interruption. No other such company currently exists in Sacred Wind’s service area.

Additionally, the customers that Sacred Wind serves are generally low-income and reside in extremely rural, remote areas. The average annual individual income in Navajo, NM is \$6,176, which is 75 percent below the statewide average (\$25,257) and 80 percent below the national average (\$31,177).⁶ Over 42.9 percent of Navajos live under the national poverty level,⁷ the highest poverty rate in the country, even among American Indians. Sacred Wind calculates that, among the yet-unserved households in the more remote areas of its territory, even higher poverty levels exist. Almost 75 percent of Sacred Wind’s customers participate in the FCC’s Tribal Lifeline program.

⁵ Though census data had indicated 7,505 homes within the study area, as discussed herein Sacred Wind has identified over 4,700 additional locations within the study area while reviewing its A-CAM II offer. This calculation is made difficult by the fact that the U.S. Census Bureau’s census block boundaries differ from the Navajo Nation Chapter boundaries. The New Mexico Public Regulation Commission’s study area boundaries differ from both of these as well.

⁶ U.S. Census Bureau, *American Fact Finder*, Selected Economic Characteristics for Navajo CDP, New Mexico (last visited July 17, 2019).

⁷ The Navajo Nation, [An Overview of the Navajo Nation – Demographics](#) (last visited July 17, 2019).

No wireline competitive local exchange carriers exist in Sacred Wind's service area. Only mobile wireless carriers operate within reach of Sacred Wind's service territory, and only one mobile wireless carrier—Smith Bagley, operating as Cellular One—has developed the communications infrastructure necessary to serve portions of the interior of Sacred Wind's service territory, mainly in the northeast sector of Sacred Wind's northern exchange and the western sector of Sacred Wind's southern exchange. However, Sacred Wind has observed that much of the mobile wireless infrastructure built away from paved roadways on Navajo lands is not supported by fiber optic-delivered bandwidth and does not provide 4G, and in some cases even 3G, mobile services.⁸

Approximately one-fourth of Sacred Wind's customers reside in small HUD or Navajo Housing Authority developments and neighborhoods surrounding a Chapter House. The remaining three-fourths- are scattered over the greater part of the 3,200 square mile service territory, making the housing density for the majority of Sacred Wind's service territory less than one home per square mile.

B. Broadband Deployment Costs In Rural Tribal Areas Are Significant.

After the completion of major components of its fiber and microwave-to-fixed wireless and copper network, Sacred Wind introduced broadband to the Navajo Reservation lands and near-Reservation lands in its service territory. In order to overcome daunting rights of way obstacles and external pessimism regarding broadband delivery to hundreds of homes that never even had access to basic telephone service, the company worked with local Chapters (Navajo local governmental jurisdictions) to create training programs, and service delivery and promotional materials. Today, voice and broadband service is available to 85% of its customer

⁵ The most common term for a cellphone in the Navajo language is *Bil Nijoobali*, which means “spinning around with it” – an allusion to the customer spinning around at the top of a hill to receive a signal.

base, with broadband at download speeds of 4Mbps, 6Mbps, 10Mbps, 15Mbps and 25Mbps.⁹ In addition, the company's Navajo customers' broadband take-rate stands at 50 percent, both for Tribal Lifeline and non-Tribal Lifeline customers, and Sacred Wind's broadband service remains the highest speed offering anywhere on the Navajo Reservation.

Widely scattered homes separated by five mountain chains and difficult desert terrain contribute to the challenges of serving subscribers dispersed over such a vast area. These challenges, exacerbated by the low-income subscriber base, mean that Sacred Wind relies upon the FCC's Universal Service Fund ("USF") programs such as the A-CAM to cover its network operating costs. Those further costs are driven by the need to maintain a longer, broader and more technologically diverse system than most companies require to serve a like number of customers, a larger per-customer outside plant workforce, and access to Tribal and public lands that is expensive and time-consuming to acquire.

II. THE EXCLUDED LOCATIONS

Consistent with the Commission's 2016 and 2018 *Rate-of-Return Reform Orders*,¹⁰ the Bureau's A-CAM II offers included performance obligations based on study area boundaries, land area, and U.S. Census housing unit data. Sacred Wind's review of its A-CAM II offer revealed no discrepancies as to study areas boundaries or land area, but rather with the numbers of funded locations. Even when excluding ineligible locations that are not residential or business locations, Sacred Wind found that in total its A-CAM II offer excluded 4,732 locations. Detailed

⁹ When Sacred Wind commenced operations, voice penetration was less than 30%, and there was no broadband service.

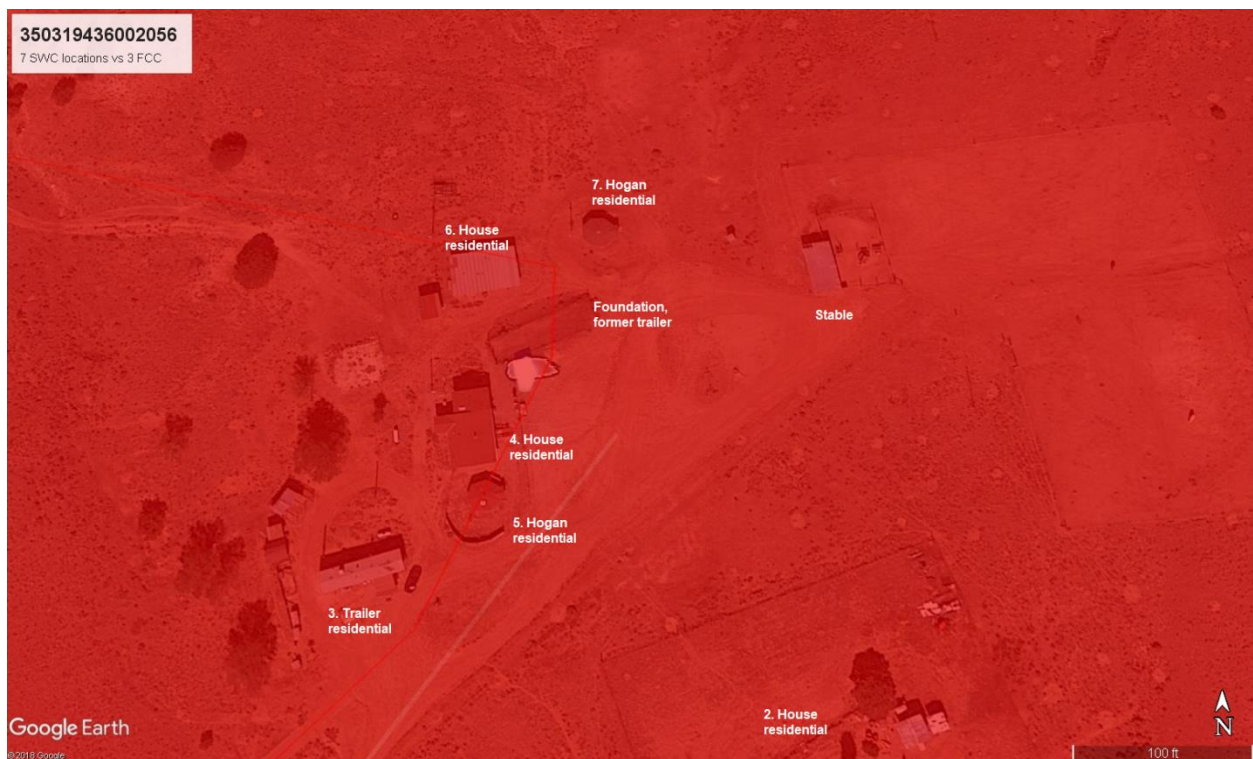
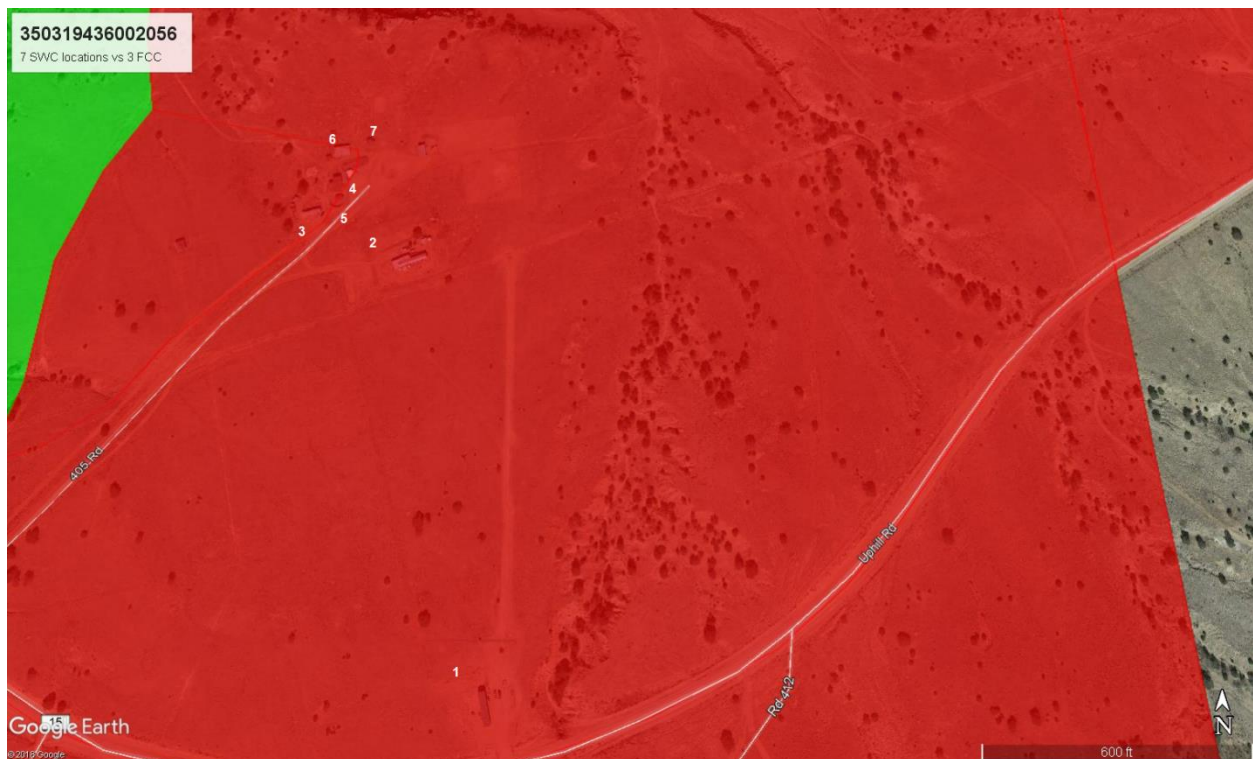
¹⁰ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016); *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 18-176 (rel. Dec. 13, 2018) (together, the "2016 and 2018 *Rate-of-Return Reform Orders*").

information on these locations is provided in a map¹¹ and Excel spreadsheet attached hereto as Exhibits 1 and 2, respectively. Many of these locations that are residences break down into the following categories:

- **Navajo Homesite Lease** – a parcel of land assigned by the Navajo Nation to a family or individual of up to one acre with up to three residential locations occupied by relatives of the applicant.
- **BIA Allotment** – a DOI/BIA managed parcel that can be from 2.5 acres to 160 acres, allotted to a Tribal family wherein multiple locations occupied by members of the same family can reside, as authorized by the majority of all family members.
- **Traditional Residential Hogan** – an octagonal or round Navajo residential structure made of timbers, stone or adobe over wood, usually one room for all residential functions and occupied by one family.
- **Trailer or Other Non-traditional Residential Structure** – a variety of structures, often a trailer or a common wood framed structure used by low income residents.

Depicted below are a detailed example and close-up of one census block (350319436002056) whereby the Commission's A-CAM II offer counted three eligible locations and Sacred Wind counted seven eligible locations.

¹¹ Red areas indicate more actual areas than funded areas; green areas indicate more funded areas than actual areas; yellow areas indicate the same number of funded and actual areas. A PDF version of the map is filed here, and a KMZ version of the map is being provided to the FCC and Bureau staff.



The total location discrepancy for Sacred Wind is staggering and may stem from flawed U.S. Census housing unit data. As recently reported by the L.A. Times, a U.S. Census Bureau audit

found that in the 2010 Census nearly 1 in 7 Native Americans living on a reservation was missed, amounting to 82,000 people overlooked and uncounted — “equal to skipping the entire city of Santa Fe, New Mexico’s capital.”¹²

III. GOOD CAUSE FOR GRANT OF THE REQUESTED WAIVER

The Commission may exercise discretion to waive its rules for good cause shown.¹³ Specifically, the Commission may grant a waiver where particular facts would make strict compliance inconsistent with the public interest.¹⁴ A waiver is also appropriate where the requested relief would not undermine the policy objective of the rule, where special circumstances warrant a deviation from the rule, and such deviation would serve the public interest.¹⁵ Because no challenge process was established for determining eligible A-CAM II locations, Sacred Wind has no alternative but to seek a waiver and extension that would allow the Bureau to correct the location data in Sacred Wind’s A-CAM II offer. Such relief would serve the public interest because it would allow Sacred Wind to receive an amount of A-CAM II support commensurate with the actual number of eligible locations to be served consistent with the funds’ intended purpose. A revised offer with the 4700+ additional locations that were excluded would allow Sacred Wind to help bridge the digital divide by deploying 25/3 Mbps broadband to all Tribal, rural and remote customers in the Navajo communities it serves. Without the requested relief, Sacred Wind will face uncertain prospects with respect to long-term

¹² “The 2020 census is coming. Will Native Americans be counted?” Kurtis Lee & Ben Welsh, Los Angeles Times (June 13, 2019), available at <https://www.latimes.com/projects/la-na-census-native-americans-navajo-nation/>.

¹³ 47 C.F.R. § 1.3.

¹⁴ See *AT&T Wireless Services, Inc. et al. v. Federal Communications Commission*, No. 00-1304 (D.C. Cir. 2001), citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

¹⁵ See generally, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); see also *Northeast Cellular* (D.C. Cir. 1990).

USF support unless the Commission were to adopt another model-based mechanism for eligible locations, particularly in Tribal areas, that thus far have been systematically excluded.

The Commission has previously held that “[c]arriers that discover there is a widely divergent number of locations in their funded census blocks as compared to the model should have the opportunity to seek an adjustment to modify the deployment obligations.”¹⁶ In circumstances where it would be impossible for a carrier to meet its A-CAM I deployment obligations due to location discrepancies, the Commission directed the Bureau to address discrepancies by adjusting the number of funded locations downward and reducing associated funding levels, and comment is currently being sought on the same downward adjustment process for A-CAM II. Similar action is warranted here where extenuating circumstances have resulted in the wholesale omission of locations in Tribal, rural and remote areas of New Mexico. In addition to Sacred Wind’s A-CAM II offer being flawed, the omission of residents and businesses in over 4,700 New Mexico locations from receiving the indispensable essential benefits of high-speed broadband and voice services would be a grievous public disservice.

The Navajo People living on Tribal lands also have a far higher than average percentage of multigenerational families living under one roof or within the confines of a BIA allotment, have a far higher than average number of grandmothers raising their grandchildren, and have a higher than average concentration of elderly living in the more remote census blocks.¹⁷ Excluding locations in the very same census blocks where other locations would be funded imposes great harm to the most vulnerable people in Tribal and rural New Mexico.

¹⁶ 2016 *Rate-of-Return Order* at ¶34.

¹⁷ “Demographic Analysis of the Navajo Nation, Using 2010 Census and 2010 American Community Survey Estimates”, Arizona Rural policy Institute, Northern Arizona University, pgs. 28 & 44.

IV. CONCLUSION

Sacred Wind urges the Commission to grant the requested waiver and extension request and direct the Bureau to revise Sacred Wind's A-CAM II offer in accordance with the provided location data.

Respectfully submitted,

SACRED WIND COMMUNICATIONS, INC.

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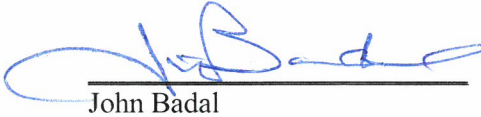
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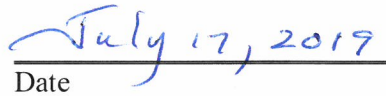
Declaration of John Badal

I, John Badal, do hereby declare under penalty of perjury the following:

1. I am the President for Sacred Wind Communications, Inc. and CEO of Sacred Wind Enterprises, Inc.
2. I have read the foregoing Petition for Waiver and attachments I have personal knowledge of the facts set forth therein, and believe them to be true and correct.



John Badal



Date